Supreme Court, U.S.
FILED
APR 10 1997
OFFICE OF THE CLERK

(2)

No. 96-1482

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

LEXECON INC., *et al.*,

Petitioners,

v.

MILBERG WEISS BERSHAD HYNES & LERACH, A PARTNERSHIP, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF CHARLES ALAN WRIGHT AS *AMICUS CURIAE* SUPPORTING PETITIONER

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April 11, 1997

16 pp

QUESTION PRESENTED

This brief is limited to Question 1 in the Petition for a Writ of Certiorari. That question is as follows:

> Whether a district court, to which a case has been transferred solely for "consolidated pretrial proceedings" under the federal multidistrict litigation statute, 28 U.S.C. § 1407(a), may transfer the case to itself for purposes of trial, notwithstanding section 1407(a)'s explicit command that every such case "shall be remanded" at the conclusion of pretrial proceedings "to the district from which it was transferred."

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This brief as *amicus curiae* is submitted on behalf of Charles Alan Wright[1] with the written consent of all

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[1] In accordance with new Rule 37.6, amicus states that he wrote this brief entirely by himself and that no one other than amicus made a monetary contribution to the preparation or submission of the brief.

parties. The letters consenting to the filing of the brief have been filed in the office of the Clerk.

INTEREST OF AMICUS CURIAE

Charles Alan Wright is a member of the Bar of this Court, of the Supreme Courts of Minnesota and Texas, and of many lower federal courts. He holds the William B. Bates Chair for the Administration of Justice at The University of Texas. He has written extensively on the federal courts, including a multivolume Treatise,[2] a Hornbook,[3] and a Casebook.[4] He was Reporter for The American Law Institute's STUDY OF DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS (1969). From 1961 to 1964 he was a member of the Advisory Committee on Civil Rules. From 1964 to 1976 and again from 1987 to 1993 he was a member of the Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States.

As a result of a lifetime of teaching and writing about the federal courts and working for their improved administration, amicus has a keen interest in seeing that

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[2] WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE (1969-1997).

[3] WRIGHT, LAW OF FEDERAL COURTS (5th ed. 1994).

[4] MCCORMICK, CHADBOURN & WRIGHT, CASES ON FEDERAL COURTS (9th ed. 1992).

those courts function efficiently. But it is equally important that the lower federal courts function only as Congress has authorized them to do. Unless the court below is reversed, lower federal courts in many cases will feel that they have power to do what the statute does not allow them to do and what Congress knowingly refrained from authorizing them to do.

REASONS FOR GRANTING THE WRIT

The issue here is not a complicated one. Pursuant to 28 U.S.C. § 1407 a case is transferred by the Judicial Panel on Multidistrict Litigation from the district in which it was filed to some other district. The transfer is, as the statute requires, for "coordinated or consolidated pretrial proceedings." When the pretrial proceedings are finished, must the case be transferred back to the district from which it was transferred or may the transferee court transfer the case to itself for trial?

The statute gives an explicit answer. The third sentence of § 1407(a) says, with a proviso not here relevant: "Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated * * *."

Clearly "shall be remanded" is mandatory language. It leaves no room for the transferee court or the panel to exercise discretion whether to remand the

case. Equally clearly, that language was no accident. The legislative history is unambiguous. Congress knew that it was authorizing transfer for pretrial proceedings only and that when those proceedings were ended, the action was to be remanded to the transferor court.[5] The matter is spelled out in words that leave no room for doubt in the report of the House Judiciary Committee on the bill that became § 1407.

> The proposed statute affects only the pretrial stages in multidistrict litigation. It would not affect the place of trial in any case or exclude the possibility of transfer under other Federal statutes.
>
> * * *
>
> The subsection requires that transferred cases be remanded to the originating district at the close of coordinated pretrial proceedings. The bill does not, therefore, include the trial of cases in the consolidated proceedings. The experience

[5] This is, of course, on the amiable fiction that Congress "knows" everything that is in the legislative history of a statute it adopts. A less fictive way of putting the matter would be that the committee of judges who drafted the statute knew exactly what they were and were not authorizing, they intended this result, and they told Congress precisely what it would be doing if it adopted the statutory language they had drafted.

> of the Coordinating Committee was limited to pretrial matters, and the committee consequently considers it desirable to keep the legislative proposal within the confines of that experience. Additionally, trial in the originating district is generally preferable from the standpoint of the parties and witnesses, and from the standpoint of the courts it may be impracticable to have all cases in mass litigation tried in one district. * * *
>
> If proposed section 1407 should be enacted and future experience justifies extending it to include consolidation for trial purposes as well, only minor amendments to the present language of the bill will be necessary.

H.R. Rep. No. 1130, 90th Cong., 2d Sess., *reprinted in* 1968 U.S.C.C.A.N. 1898, 1900, 1901-1902.

Congress was as good as its word. In 1976, as a part of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, Congress added subdivision (h) to § 1407. This allows the multidistrict panel to order that *parens patriae* actions brought by state attorneys general under § 4C of the Clayton Act be transferred for both pretrial purposes and for trial. Act of Sept. 30, 1976, Pub.L. 94-435, Title III, § 303, 90 Stat. 1396. And in 1988 the House of Representatives passed a bill that, among

other things, would have amended § 1407 to provide that in specified multiparty, multiforum cases in which at least 25 persons died or suffered damages of more than $50,000 each, "the transferee district court may, notwithstanding any other provision of this section, retain actions so transferred for the determination of liability." H.R. 4807, § 303, 100th Cong., 2d Sess. (1988). This was passed by the House on September 13, 1988, 134 Cong.Rec. H7443-7455. Those provisions were not included when the bill was passed by the Senate and signed into law. Act of Nov. 19, 1988, Pub.L. 100-702, 102 Stat. 4642.

The court below relied on portions of the legislative history, including a sentence quoted above, in which it was said that § 1407 "would not * * * exclude the possibility of transfer under other Federal statutes." The Ninth Circuit, following the lead of several other courts of appeals, thought that this permitted the transferee court to transfer the case to itself for trial under 28 U.S.C. § 1404(a). In his dissent in the court below Judge Kozinski demonstrates that a self-transfer under § 1404(a) is neither linguistically nor logically possible. (Pet. App. 39a-40a; 102 F.2d at 1544-1545). A 1948 statute cannot be given a meaning it could not have had when it was adopted in order to provide a result under a 1968 statute that Congress specifically considered and expressly rejected. And there was no need for Congress to amend § 1407 in 1976 and for the House of Representatives to approve amending it in 1988 to provide that in specified classes of cases

transfer could be for both pretrial proceedings and trial if this was already possible in all cases under existing § 1407 read in combination with § 1404(a).

Fewer than four percent of the nearly 100,000 cases transferred by the Judicial Panel on Multidistrict Litigation have been sent back for trial to the district in which they were commenced. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS 32, 80 (1995). This is not surprising. "These few remands indicate the great success of the transferee judges in terminating by settlement, summary judgment, or other types of dismissal the actions assigned to them by the Panel." Howard, *A Guide to Multidistrict Litigation*, 75 F.R.D. 577, 578 (1977). The mandatory-remand language of § 1407(a) does not apply if the action "shall have been previously terminated." But there are also a significant number of cases in which the transferee court has done exactly what was done here, cases in which the transferee court has retained the case for trial over the objection of at least one of the parties.

Courts that have done this have acted in the teeth of what Congress said in § 1407(a) and what it intended in that statute. The case for doing so is not strengthened, as the Ninth Circuit mistakenly supposed, by the fact that Rule 14(b) of the Judicial Panel allows self-transfer by the transferee court. The Panel's power to make rules is limited to those "not inconsistent with Acts of Congress * * *." 28 U.S.C. § 1407(f). Nor does

it help that a number of other lower courts have allowed self-transfer. If Congress has not given the courts authority to do something, they cannot acquire that authority by adverse possession. The lower federal courts are creatures of Congress and have only the powers that Congress has vested in them. Judge Sirica phrased the matter felicitously:

> Simply stated, Congress may impart as much or as little of the judicial power as it deems appropriate and the Judiciary may not thereafter on its own motion recur to the Article III storehouse for additional jurisdiction. When it comes to jurisdiction of the federal courts, truly, to paraphrase the scripture, the Congress giveth, and the Congress taketh away.

Senate Select Committee on Presidential Campaign Activities v. *Nixon*, 366 F.Supp. 51, 55 (D.D.C.1973).

What was said of jurisdiction is equally true of venue. Venue differs from subject-matter jurisdiction in that it is waivable. But absent waiver, it is as much for Congress to say in which federal court a case shall be tried as it is for it to say whether a case can be heard at all by the lower federal courts. The lower courts that have claimed a power of self-transfer, though the statute forbids it, have been well-intentioned. They have thought, as the court below did, that "[p]ermitting the transferee court to transfer a case to itself upon

completion of its pretrial work often promotes efficiency in the disposition of the case or cases." (Pet. App. 13a; 102 F.3d at 1532). But this does not justify ignoring what Congress has said. "The requirement of venue is specific and unambiguous; it is not one of those vague principles which, in the interest of some overriding policy, is to be given a 'liberal' construction." *Olberding* v. *Illinois Central R. Co.*, 346 U.S. 338, 340 (1953).

This is not a case in which Congress has used ambiguous language. When the 1966 amendment to the general venue statutes allowed suit in "the judicial district * * * in which the claim arose," it used language that was inevitably litigation-breeding. Many lower courts read the statute in a way that allowed plaintiff to bring suit in a district convenient to it. But this Court rebuffed such interpretations of the statute, saying that it was "absolutely clear that Congress did not intend" to give plaintiff a choice that would best suit its convenience. *Leroy* v . *Great Western United Corp.*, 443 U.S. 173, 185 (1979).

Nor is this a case in which Congress has not spoken to an issue and may well not have thought about it. Every circuit except one accepted the concept of "pendent parties" in federal-question cases. But the Court was not swayed by this near-consensus of the lower courts. In the absence of an affirmative grant of pendent-party jurisdiction, it held that the federal courts lacked power to exercise such jurisdiction. *Finley* v. *United States*, 490 U.S. 545 (1989).

It may well be that it would be desirable in mutlidistrict case to allow transferee courts to try the cases as well as conduct pretrial proceedings. The American Law Institute so concluded. COMPLEX LITIGATION: STATUTORY RECOMMENDATIONS AND ANALYSIS § 3.06(a), at 106 (1994). Its recommendation, however, was in the form of proposed legislation for Congress to adopt. Congress itself thought it would be desirable to allow trial in the transferee court with regard to *parens patriae* actions under the Clayton Act, and it amended the statute accordingly. 28 U.S.C. § 1407(h). The House of Representatives thought so in 1988 with regard to mass-disaster litigation, but the Senate did not go along with changing the statute for those cases. See p. 5 above.

This Court should grant certiorari to hear this case. The question of the power of the transferee court is a recurring one in many cases, as is evident from the reported cases in which it has been an issue. But more important even than the resolution of that specific issue is the question of separation of powers that underlies it. The line between those things that the courts can decide for themselves and those on which they may do only those things that Congress has authorized them to do is an important one. It must always be drawn bright and clear.

CONCLUSION

The petition for a writ of certiorari should be granted, at least with regard to Question 1 of the Questions Presented.[6]

Respectfully submitted,
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April 11, 1997

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[6] Amicus expresses no view with regard to Question 2.